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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

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(Submitted upon consent)

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. is a membership corporation composed of most of the leading publishers of books of general circulation and university presses. It is estimated that the 146 members of the Council publish and distribute not less than 90% of all general books. Among these publishers are Doubleday & Company, The Macmillan Company, McGraw-Hill Book Company, Inc., Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown and Co., Random House, Inc., The Viking Press, Inc., and Alfred A. Knopf, Inc.; among the university presses are those of Columbia, Harvard, Yale, Princeton, North Carolina, Louisiana, Minnesota, Oklahoma, California and Stanford.

As publishers, the members of the American Book Publishers Council, Inc. are keenly interested in safeguarding freedom of the press as guaranteed by the First Amendment. The Council files this brief, because its members believe that Section 1461 of Title 18, U. S. C., as applied in the instant case, violates such freedom. This position is taken without reference to the publications upon which the conviction herein was predicated.

The Statute Here Under Consideration

The statute under which the petitioner was convicted, at the time of the indictment, insofar as here pertinent, read as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—* * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> "Every letter, packet, or package or other mail matter containing any filthy, vile, or indecent thing, device, or substance; * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination" (18 U. S. C., Section 1461, 62 Stat. 768).

Contention of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. submits that this statute, as herein applied, involves an unconstitutional abridgment of the rights guaranteed by the First Amendment because of the failure to satisfy the requirements of the "clear and present danger" rule as laid down by this Court.

Argument

The three freedoms set forth in the First Amendment—freedom of speech, of the press, and of religion—occupy "the preferred place given in our scheme. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 530 [1945]. See also *Saia* v. *New York*, 334 U. S. 558, 561 [1947]). These basic freedoms are not subject to regulation in the same manner as matters relating to business, labor and health may be regulated by Congress.

This protection extends to all types of writings, irrespective of their literary worth. In *Winters* v. *New York*, 333 U. S. 507, 510 (1948) this Court said "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 153, 158." The Court thereby rejected the contention "that the constitutional protection for a free press applies only to the exposition of ideas".

Furthermore, it has never been actually decided by this Court that different constitutional standards are to be

applied to publications relating to sex than have been uniformly applied to publications relating to other subjects. The assumption that the First Amendment does not protect against the publication of "obscene" writings, proves upon analysis to be without foundation. Those who have made this assumption apparently consider that the presentation of sexual problems is in some sort of category by itself, and that therefore any depiction of sex conduct is removed from the constitutional protection of freedom of the press. Such doctrine obviously would deny protection to discussion of a significant part of life. Research has revealed nothing in the history of the Bill of Rights which would support that exclusion. Madison, a leader in the framing of the Bill of Rights, in describing the sentiment leading to the guaranty of freedom of the press in State constitutions, said:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." (Report on the Virginia Resolutions, *Letters and Other Writings of James Madison*, Vol. 4, p. 544.)

It seems clear, therefore, in the light of the *Winters* case, that the right to publish printed matter, even though of little or no literary value, and whether or not concerned with matters of sex, must be measured by the same test which has governed the decisions involving attempts to restrict freedom of speech and of the press since *Gitlow* v. *New York*, 268 U. S. 652 (1925).

Thus, it is submitted that Section 1461, like any other statute in derogation of the First Amendment, is subject to

the same test as to validity. That test, although it has been stated in varying terms, is the classic "clear and present danger" test, as set forth in *Schenck* v. *United States*, 249 U. S. 47 (1919). There this Court held that the broad protection guaranteed by the First Amendment excepts only such utterances or writings as "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (p. 52). In *Dennis* v. *United States*, 341 U. S. 494, 510 (1951), this Court modified this test by holding that it is sufficient that there exist the *probability* of such a danger. Thus, this Court stated:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Unlike the situation in most of the First Amendment cases which have come before this Court in recent years, we do not have in this case any guidance as to the "substantive evil" which the statute was designed to prevent. Thus, neither the statute itself, nor any authoritative interpretation thereof, informs us whether it is designed to prevent in the normal adult reader (1) the arousing of lewd thoughts and desires or (2) incitement to crimes or other anti-social conduct.

If the substantive evil which Congress was aiming to eliminate was the arousing of lewd thoughts and desires, such legislation would appear to be clearly unconstitutional as *thought control*.

Over seventy-five years ago this Court said in *Reynolds* v. *U. S.*, 98 U. S. 145, 164 (1878):

> "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

See also:

West Virginia State Board of Education v. *Barnette*, 319 U. S. 629, 642-643 (1943);
American Communications Ass'n v. *Douds*, 339 U. S. 382, 396, 406-412 (1950);
Dennis v. *United States*, 341 U. S. 494, 502 (1951).

That the substantive evil is indeed the arousing of lewd thoughts and desires seems clear from the very definition of "obscenity" as charged by the Trial Court in the instant case:

> "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts." (T. R. 25)

This charge correctly incorporated the approved test of "obscenity" as appears from the concurring opinion of Judge Frank who stated that "the correct test is the effect on the sexual thoughts and desires * * * of average, normal, adult persons" (T. R. 48). It was precisely because the arousing of lewd thoughts and desires was the "substantive evil" that prompted Judge Frank to state "that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable" (T. R. 50).

However, if the substantive evil which Congress sought to eliminate was the perpetration of crime or other anti-social conduct resulting from the dissemination of obscene publications, then there must be proof of the existence of such a substantive evil.

The fact is that there was no proof in the Trial Court as to what the substantive evil was or that the danger thereof was so clear and immediate or probable as to justify suppression of publication.

Nor is this failure of proof remedied by the holding of this Court in *Dennis* v. *United States*, *supra*, that "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts" (p. 513.) For, obviously, before a court may rule as a matter of law that there is "a clear and present danger of a substantive evil that Congress has a right to prevent", there must be a determination as to what the substantive evil is, and, additionally, there must be some basis for a finding that there is causal relationship between the act complained of and such substantive evil.

The simple fact remains that it has been *assumed*, but never established, that there is a causal connection between the reading of obscene literature and the perpetration of crime or other anti-social conduct. "The advocates of obscenity censorship simply assume, with no attempt at proof, that reading about sex is a primary cause of sexual deviation". (Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minnesota Law Review 295, 383 [1954] and authorities there cited.)

The dictum of this Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 (1942) to the effect that certain "well defined and narrowly limited classes of speech" have no constitutional protection and that these include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace", must be read in the context of the *Chaplinsky* case, which involved the utterance of insulting epithets upon the public streets.

It is submitted that such dictum has no application to a publication directed, not to an individual, but generally to the public at large. For in the instances above enumerated in the *Chaplinsky* case, the substantive evil, as to which there is clear and present danger, may well be a breach of the peace. It is obvious that if some one mails a letter to a particular person, containing obscene or indecent proposals, as was the case in *United States* v. *Limehouse*, 285 U. S. 424 (1932), or utters such words in the presence of others, the recipients or auditors may well be moved to inflict corporal punishment upon the perpetrator —bringing about a breach of the peace.

In conclusion, it is submitted that since there has never been established any causal connection between the dissemination of obscene publications and any substantive evil, the restriction on freedom of the press imposed by Section 1461 cannot be justified.

Respectfully submitted,

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